

D.T.E. 03-40-A

Petition of Boston Gas Company d/b/a KeySpan Energy Delivery New England, pursuant to General Laws Chapter 164, § 94, and 220 C.M.R. § 5.00 et seq., for a General Increase in Gas Rates.

ORDER ON MOTIONS FOR CLARIFICATION BY THE COMPANY
AND THE ATTORNEY GENERAL

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I. INTRODUCTION

On October 31, 2003, the Department of Telecommunications and Energy (“Department”) issued an Order in Boston Gas Company, D.T.E. 03-40 (2003). Within this Order, the Department approved an annual adjustment mechanism to recover costs associated with the pension of Boston Gas Company (“Company”). D.T.E. 03-40, at 308-312.

On November 20, 2003, the Company filed a motion for clarification or, in the alternative, reconsideration (“Company Motion”) of the Department’s Order regarding whether the annual adjustment mechanism permits the Company to recover annual PBOP deferrals as well as carrying charges on deferred PBOP balances. Also on November 20, 2003, the Attorney General of the Commonwealth of Massachusetts (“Attorney General”) filed a motion for clarification or, in the alternative, reconsideration (“Attorney General Motion”) regarding three issues: (1) whether the additional dollars collected through the annual adjustment mechanism will be deposited into the Company’s pension and PBOP trusts; (2) whether the Company may accelerate recovery of its PBOP transition obligation; and (3) whether the Company must recalculate its revenue requirement. On December 5, 2003, the Company filed an opposition to the Attorney General Motion (“Company Opposition”) and the Attorney General filed an opposition to the Company Motion (“Attorney General Opposition”).

II. SUMMARY OF MOTIONS AND OPPOSITIONS

A. Company Motion for Clarification or Reconsideration

____As grounds for its Motion, the Company asserts that the Department's Order is silent on the annual adjustment mechanism that will be used to recover annual PBOP deferrals as well as the carrying charges on deferred PBOP balances (Company Motion at 1). With respect to the recovery of PBOP deferrals, the Company claims that (1) the Department's acknowledgment in D.T.E. 03-40, at 308, that the Company currently reconciles its annual PBOP cost with the amount collected in rates and records the differences in a deferral account amounts to our approval of using the annual adjustment mechanism to recover annual PBOP deferrals; and (2) accounting standards require the recovery of the PBOP deferrals within a reasonable period of time (id. at 3-9). With respect to the carrying charges on the deferred PBOP balances, the Company argues that the Department's statement that we approve "the WACC as the carrying charge rate for the prepaid pension and PBOP balances" indicates our authorization of the Company's applying carrying charges to any deferred PBOP deferrals (id. at 4, n. 4, citing D.T.E. 03-40, at 312).

The Attorney General claims that the Company fails to satisfy the Department's standard for reconsideration (Attorney General Opposition at 1). The Attorney General contends that the Department clearly denied recovery of PBOP deferrals and application of carrying costs to those deferrals (id. at 1-2, citing D.T.E. 03-40, at 309, n.130). He also asserts that the Company fails to show extraordinary circumstances that would require the

Department to take a fresh look at either the issue of recovery of PBOP deferrals or the issue of carrying costs on any PBOP deferral (id. at 1).

B. Attorney General Motion For Clarification or Reconsideration

As grounds for his request for clarification regarding the use of a pension trust fund for the dollars collected through the new mechanism, the Attorney General states the Department is silent as to whether the Company must deposit additional monies collected through the annual adjustment mechanism into the pension and PBOP trust fund (Attorney General Motion at 3-4). The Company replies that clarification is inappropriate and that the Attorney General's request is an attempt to reopen the record (Company Opposition at 2-3).

As grounds for his request for clarification regarding the Company's recovery of its PBOP transition obligation, the Attorney General states that the Order denies the Company recovery of its amortization of \$44 million in PBOP transition obligation through the annual adjustment mechanism (Attorney General Motion at 4). Therefore, the Attorney General claims the Company may not accelerate its amortization of the \$44 million PBOP transition obligation (id.). Alternatively, if the Department did accept the acceleration, the Attorney General requests that Department recalculate the Company's revenue requirement (id.). The Company responds that the Order clearly does permit the ten-year amortization acceleration of its PBOP transition obligation and there is no reason to recalculate its revenue requirement (Company Opposition at 3-7). The Company concludes that clarification is inappropriate (id.).

III. STANDARD OF REVIEW

A. Reconsideration

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department Order. The Department's policy on reconsideration is well-settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1981).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England

Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

B. Clarification

Clarification of previously issued Orders may be granted when an Order is silent as to the disposition of a specific issue requiring determination in the Order, or when the Order contains language that is sufficiently ambiguous to leave doubt as to its meaning.

Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

IV. ANALYSIS AND FINDINGS

A. Company Motion Regarding Recovery of Carrying Costs and PBOP Deferrals

The Company requests clarification that it may recover carrying charges accrued on deferred PBOP balances (Company Motion at 3-4). In D.T.E. 03-40, at 312, however, the Department authorized the Company to “receive the WACC [weighted average cost of capital] as the carrying charge for the prepaid pension and PBOP balances.” Therefore, the Order is not ambiguous. Accordingly, the Company’s request for clarification is denied with respect to carrying charges on PBOP balances.

The Company also requests clarification that the Order allows the Company to recover its PBOP costs through the annual adjustment mechanism approved in D.T.E. 03-40,

at 308-309 (Company Motion at 4-9). The Company asserts that its proposal includes the annual reconciliation of PBOP expenses in the new annual adjustment mechanism in order to meet the requirements of Financial Accounting Standards No. 71¹ (“FAS 71”) (id. at 5). FAS 71 specifies that there must be an assurance that costs deferred are probable of recovery in a reasonable period of time (id.). Otherwise, the Company would be precluded from maintaining the PBOP deferrals on its books (id. at 6).

In D.T.E. 03-40, at 313, we state that PBOP and PBOP transition costs will continue to be recovered through base rates. D.T.E. 03-40, at 313. On its face, the Department’s Order is clear on this point. Therefore, the Company’s request for clarification on this issue is inappropriate. In the alternative, however, the Company has asked that we reconsider our decision. Our Order was based on the fact that the Company had not requested recovery of its deferred PBOP costs through the annual adjustment mechanism. Id. at 313, citing Tr. 22, at 3022-3023. The Company points to evidence that indicates the Company’s intent to recover deferred PBOP costs through the annual adjustment mechanism (Exhs. KEDNE/JFB-1, at 37-38; KEDNE/JFB-2). The Company concedes that its statements on the record regarding the establishment of the PBOP recovery mechanism may have been insufficiently clear to establish its actual intent (Company Motion at 6). As a result, through inadvertence, we required that PBOP and PBOP transition costs to be recovered through base rates. Under these circumstances, we find reconsideration appropriate.

¹ FAS 71, effective 1983, established standards for accounting for the effects of certain types of regulation. SFAS 71 sets forth the specific criteria that must be met for a regulated company to establish a regulatory asset.

In light of the Company's explanation of the need to include PBOP deferrals in the annual adjustment mechanism, we agree that the mandates of FAS 71 as well as our precedent established in Boston Edison Company/Commonwealth Electric Company/Cambridge Electric Light Company/ NSTAR Gas Company, D.T.E. 03-47-A (2003) (allowing a pension and PBOP annual adjustment mechanism) make it appropriate to include PBOP deferrals in the Company's annual adjustment mechanism. Accordingly, the Company's request for reconsideration is granted with respect to the inclusion of PBOP deferrals in the annual adjustment mechanism.

The Department's decision here to move the recovery of Boston Gas' PBOP deferrals from base rates to the annual adjustment mechanism affects a number of components in the Company's base distribution revenue requirements, including operation and maintenance expense, uncollectible expense, cash working capital allowance, return on rate base, and income taxes. In addition, the Department's decision in D.T.E. 03-40-B concerning the Company's motions relative to incentive compensation and inflation allowance also affect the Company's base distribution revenue requirements in these same categories. The effects of our decisions in both this Order and in D.T.E. 03-40-B on the Company's revenue deficiency are provided in the attached schedules.

B. Attorney General Motion

_____ 1. Pension Trust Fund

In D.T.E. 03-40, at 306-314, the Department approved an annual adjustment mechanism that allows the Company to recover additional amounts for pension costs that are

not being recovered currently through base rates. The Attorney General seeks clarification that all funds recovered through the resulting tariffs must be deposited into the pension trust created to provide pension benefits to the Company's employees (Attorney General Motion at 3-4).

First, a portion of the funds collected by the Company will cover carrying costs incurred to support the Company's prepayment and deferrals of pension and PBOP obligation. D.T.E. 03-40 at 311-312. Second, the funding obligation for the pension and PBOP plans are governed by the Employee Income Retirement Security Act and Internal Revenue Service rules and regulations. D.T.E. 03-47-A at 5. Third, if the Company is collecting more in rates than can be funded in the pension trust, then the Company's pension collection recovered in rates is greater than contributions to the pension plan.² Under this circumstance, the Company's prepaid pension balance, and the carrying charges thereon, will be reduced.

The Attorney General's request for clarification is actually a new request to restrict the use of any additional amounts collected for pension cost. As such, it is more appropriately considered as a motion for reconsideration. The Attorney General, however, has not established any extraordinary circumstance that would warrant such reconsideration. Therefore, the Attorney General's request regarding the use of the additional amounts collected for pension cost is denied.

² Prepaid pension balances are created when contributions exceed expense. When the reverse is true, prepaid balances, upon which carrying charges are based, are reduced. See D.T.E. 03-47-A at 37.

2. PBOP Amortization

In D.T.E. 03-40, at 303, the Company proposed to collect its PBOP transition obligation in its proposed annual adjustment mechanism. The Department reasoned, however, that PBOP transition obligation is distinct from the Company's pension costs. Id. We stated that the PBOP transition costs have a different amortization period and are not eligible for carrying charges. Id. We concluded by requiring the Company to continue recovering PBOP transition costs through base rates. D.T.E. 03-40, at 313. Further, we did not modify the Company's proposed ten-year amortization period of the PBOP transition obligation. Our Order in D.T.E. 03-40 unambiguously permits the Company to recover its PBOP transition obligation over ten years. See D.T.E. 03-40, at 512, Sch. 1. Therefore, clarification is inappropriate.

The Attorney General argues alternatively that, if the Company is allowed to recover its deferred PBOP transition obligation, the Department must recalculate the Company's revenue requirement (Attorney General Motion at 4). The Attorney General claims that permitting recovery of the deferred PBOP transition obligation through base rates would result in excess cost recovery by the Company because the test year cost of service already includes the amortization of \$2.5 million to \$3.0 million of PBOP transition obligation expenses (id. at 5). As the Company correctly notes, however, it is the existing rate level that includes the \$2.5 million to \$3.0 million associated with the transition obligation, not the cost of service (Company Reply at 5). Accordingly, there is no excess recovery of these costs, and recalculation is inappropriate.

In conclusion, the Attorney General has not stated sufficient circumstances or ambiguity to require clarification of the Order regarding deferred PBOP transition obligations.

Therefore, the Attorney General's motion for clarification with respect to the deferred PBOP transition obligation is denied.

V. EXTENSION OF JUDICIAL APPEAL PERIOD

A. Introduction

We now address the Attorney General's and the Company's motion to extend the judicial appeal period. The Attorney General filed his request for extension of the judicial appeal period on November 14, 2003. This was six days before the appeal period ended and prior to filing any motion for clarification or reconsideration. The Company filed its request on November 20, 2003, the last day of the twenty-day deadline.

B. Standard of Review

_____ General Law c. 25, § 5, provides in pertinent part that a petition for appeal of a Department order must be filed with the Department no later than 20 days after service of the order "or within such further time as the commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling." See also 220 C.M.R. § 1.11(11). The 20-day appeal period indicates a clear intention on the part of the legislature to ensure that the decision to appeal a final order of the Department be made expeditiously. Nunnally, D.P.U. 92-34-A (1993); see also Silvia v. Laurie, 594 F. 2d 892, 893 (1st Cir. 1978). The Department's procedural rule, 220 C.M.R. § 1.11(11), states that reasonable extensions shall be granted upon a showing of good cause. The Department has

stated that good cause is a relative term and depends on the circumstances of an individual case. Boston Edison Company, D.P.U. 90-335-A at 4 (1992). Whether good cause has been shown “is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other party.” Id. The filing of a motion for extension of the judicial appeal period automatically tolls the appeal period for the movant until the Department has ruled on the motion. Nandy, D.P.U. 94-AD-4-A at 6 n.6 (1994); Nunnally, D.P.U. 92-34-A at 6 n.6 (1993).

C. Analysis and Findings

As the grounds for his request for an extension of the judicial appeal period, the Attorney General simply stated he may be filing motions for clarification and reconsideration.³ This is not an adequate showing of good cause. The Company waited until the last day of the judicial appeal to file a request for extension as well as a motion for reconsideration on one issue. This is not expeditious treatment of the matter of concern to the Company.

We recognize, however, that it would be difficult and burdensome to require the Attorney General and the Company to file an appeal the same day we issue this Order. Instead, we find it appropriate to allow the Attorney General and the Company seven days

³ Filing a request for extension of time to file an appeal in advance of filing the underlying substantive motion does not address the Legislature’s intent that the decision to appeal a final order of the Department be made expeditiously.

from the date of this Order in which to file a petition for appeal with the Secretary of the Department, should the Attorney General and the Company so choose.⁴

⁴ An appellant must file its appeal with the Supreme Judicial Court within ten days of filing its petition for appeal of an Order with the Department. G.L. c. 25, § 5.

VI. ORDER

Accordingly, after due notice, hearing and consideration, it is

ORDERED: That Boston Gas Company's Motion for Clarification be, and hereby is, ALLOWED in part and DENIED in part; and it is

FURTHER ORDERED: That Boston Gas Company's Motion for Reconsideration be, and hereby is, ALLOWED; and it is

FURTHER ORDERED: That the Attorney General's Motion for Clarification or Reconsideration be, and hereby is, DENIED; and it is

FURTHER ORDERED: That the Attorney General and Boston Gas Company shall have seven days following the issuance of this Order in which to file any petition for appeal regarding any issue in this docket with the Secretary of the Commission; and it is

FURTHER ORDERED: That Boston Gas Company comply with all directives in this Order.

By Order of the Department,

Paul G. Afonso, Chairman

James Connelly, Commissioner

W. Robert Keating, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner